No. 17303

United States Court of Appeals

For the Ninth Circuit

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, OF BREMERTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION,
BEFORE THE
HONORABLE JUDGE WILLIAM J. LINDBERG

APPELLANT'S REPLY BRIEF

MARION GARLAND, JR.
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DICKSON-FLETCHER BREMERTON, WASH.

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RE-STATEMENT OF FACTS

On Page 8 of Appellee's printed Answer, the Appellee sets forth the United States was dismissed as defendant in the hearing in the District Court, Cause No. 4929 on the motion of First Federal Savings

& Loan Association of Bremerton. This is in error. First Federal started its original action in the Superior Court of the State of Washington for Kitsap County. The action was removed to the District Court, Seattle, Washington on motion of the United States Government as provided by 28 USC 2410 and 28 USC 1441 to 1444. The United States at that time as defendant asked the court to dismiss the United States from the action. The U.S. was dismissed on ground it had never allowed itself to be sued. Under 28 USC 2410 a lease was not a mortgage or other lien by which the United States had allowed itself to be sued.

The contention of the Government was refuted by appellant, nevertheless the motion was granted and the case was remanded back to the State Court without the United States as a party. The action was processed in the State Court and resulted in appellant becoming the owner of the property on which the post office is located. The United States Post Office Department then initiated the action at bar, and named appellant as a party defendant. The United States has since the commencement of this action, taken the position that appellant cannot assert a claim against

the United States Post Office, but must receive its rent money through the court of claims. Appellant contested this, but does not appeal from this part of the judgment and this question is set before this Court of Appeals.

Appellant at this time does not make a claim against the United States. This action is entirely the United States claiming that they have a lease and this being denied by the Appellant.

Except as herein explained, it is believed the Statement of Facts as set forth in the Appellant's Opening Brief, and in the Appellee's Answering Brief, are correct.

ARGUMENT IN ANSWER TO THE APPELLEE'S MOTION TO DISMISS

The Appellant sold the building in which the post office of the Appellee is located. When the post office building was sold it was the new owner's responsibility to determine the post office rights under the purported lease. There was therefore an assignment of the action at bar.

The Appellee claims this assignment is in violation of 31 USCA 203, the pertinent parts of which are as follows:

> "All transfers and assignments made of any claim upon the United States * * * except as hereinafter provided, shall be absolutely null and void, * * *. The provisions of this section shall not apply to payments for rent of post office quarters made by post masters, to duly authorized agents of the lessors."

There are three arguments in answer to the appellee:

First: The Appellant has not in this case, made any claim upon the United States. They merely are defending themselves. The United States are claiming the right to possession under an instrument claimed to be a lease.

Second: There has been a sale of the subject matter of the lawsuit, and therefore the real party at interest has become Joseph P. Mentor, Jr., and the law requires the real party in interest prosecute the action. It was not the intent of 31 USC 203 to prohibit the sale of real property.

Lastly: The Statute itself exempts "payments for rent of post office quarters."

Enlarging upon these three arguments:

First: This assignment was not a claim against the United States. It was a sale of property against which the United States claims a leasehold interest and has brought an action to protect its leasehold interest. There are no cases in point cited by the Appellant, and the closest case is from the Sixth Circuit 1951, *United States vs. Jordon*, 186 F. 2d, 808:

> (12) Two of the claimants, * * * purchased their respective tracts of land from former owners and lessors after the termination of the Government's leaseholds, without knowledge that the value of the timber had been destroyed. Upon later discovery of the damage, the former owners executed assignments to the purchasers by which they assigned any and all claims against the Government "arising out of express or implied covenants in the aforesaid lease." The Government contends that the assignments are contrary to the provisions of the anti-assignment statute, 31 U.S.C.A. § 203, and that the assignees are barred from prosecuting their respective claims herein. *United States v. Gillis*, 95 U.S. 407, 24 L. Ed. 503. There are numerous exceptions to the literal wording of the statute. *Goodman v. Niblack*, 102 U.S. 556, 559-561, 26 L. Ed. 229; *Erwin v. United States*, 97 U.S. 392, 397, 24 L. Ed. 1065; *Seaboard Air Line Ry. v. United States*, 256 U.S. 655, 41 S. Ct.

611, 65 L. Ed. 1149; *Western Pacific R.R. Co. v. United States*, 268 U.S. 271, 45 S. Ct. 503, 69 L. Ed. 951; *Old Colony Ins. Co. v. United States*, 6 Cir., 168 F. 2d 931, 934; *United States v. South Carolina Highway Dept.*, 4 Cir. 171 F. 2d 893, 899. In the present case, the leases with the former owners ran in favor of the owners, their heirs, "successors and assigns." The claims here asserted arise out of these leases containing the express or implied covenants, as found by the trial judge, entitling the owners and their assigns to recover damages to the standing timber in addition to the rental value paid. The subsequent written assignments were incidental to the prior sale of the land, and in furtherance of the vendor's obligations under their deeds of conveyance. The purposes of the statute were in no way violated. *Goodman v. Niblack*, *supra*, 102 U.S. at page 506. We agree with the ruling of the District Judge.

Second: This action affects the future use of land in question. By bringing the action, did the United States mean to forbid the merchandising of this property, subject to their interests therein. Obviously the restraint of the handling of properties would be clearly against public policy, and unless there is some specific statute forbidding it, would not be sanctioned by the court. It was not the purpose of the assignment statute to forbid the sale of land. The real party in

interest, is the one whom the government would deal with for the next fifteen years, and should be the one with whom they decide whether or not they have a lease. The purpose of 31 USC § 203, was not to stop the sale of land, on which the government was trying to prove a long term lease. The purpose of the statute is well set out in the case of *Matter of Ideal Mercantile Corporation*, a 1957 case, from the Second Circuit, 244 F. 2d, 828:

> (7) The Assignment of Claims Act was first enacted in 1853, purportedly (1) "to prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government," (2) "to prevent possible multiple payment of claims, to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant," and (3) "to save to the United States 'defenses which it has to claims by an assignor by way of set off counter claim, etc., which might not be applicable to an assignee.' " *United States v. Shannon*, 1952, 342 U.S. 288, 291-292, 72 S. Ct. 281, 283-284, 96 L. Ed. 321; see *United States v. Aetna Cas. & Surety Co.*, 1949, 388 U.S. 366, 373, 70 S. Ct. 207, 94 L. Ed. 171; *Goodman v. Niblack*, 1880, 102 U.S. 556, 560, 26 L. Ed. 229; *Spofford v. Kirk*, 1878, 97 U.S. 484, 490, 24 L. Ed. 1032.

It is interesting to note that all of the cases cited in the annotations, 31 USCA § 203, involve claims for money of one kind or another, prosecuted by someone against the Government or one of its branches. All cases referred to by the text books, are similar cases and nowhere can I find an interpretation of the word "claim" to mean other than a claim of compensation or a claim of money. It is to be noted in the case at bar, the claim of money, if any, to be had against the United States has already been ruled to be a claim to be taken up in the Court of Claims. This action is solely for the purpose of establishing whether or not the United States has a lease. I do not believe a claim is involved.

Third: In answer to the Government's argument for dismissal under the assignment clause, is found in the Statute itself. 31 USC, P 203 states:

> "The provisions of this section shall not apply to payments for rent of post office quarters made by postmasters to duly authorized agents of the lessors."

It can be said, of course, that this uninterpreted amendment to the law could mean many things, but its obvious meaning is that it exempts claims for rents,

under a lease which at least the Government contends to be a duly authorized, executed, binding and valid lease made by the postmaster.

ARGUMENT ON SUBSTITUTION OF PARTY APPELLANT

The Court, no doubt has already seen the motion to substitute parties appellant. At the time of an assignment of the cause of action to Joseph P. Mentor, Jr., notice was given to the court that there had been an assignment.

No motion to substitute was made because the attorney for the appellant believed the Honorable Court would, if it wanted, on its own motion, direct a change of parties appellant. It was felt by the writer that it would probably be less confusing for the nominal party appellant to be First Federal Savings & Loan Association of Bremerton in all the courts, so long as all parties knew the real party in interest was Joseph P. Mentor, Jr. No one is being misled.

The court's power to do this is amply set forth in the Appellee's Answering Brief on Page 18. The text, *Barron and Holtzoff*, under Volume 2, page 238,

P 621, commenting on Rule 25, says: "Rule 25 does not apply to proceedings on appeal, they are governed by rules of the Court of Appeals, under which substitution is freely allowed." If the above entitled court has passed a specific rule on this subject, it has escaped my perusal, but I do ask the leniency of the court, in the event I have been incorrect in my method of getting substitution of parties.

Normally this case would not require a reply brief, if it were not for the question of dismissal, which has been previously argued. However, since a reply brief is in the offing, I make the following comments on the merits of the case.

ARGUMENTS AS TO MERIT OF THE CASE

1. Application of State Law as Versus Federal Law.

The argument in favor of federal law is very well set out on Pages 24 through 29 of the Appellee's Brief. The Appellee on Page 29 of his brief concludes as follows:

> "It follows that the district court properly rejected the peculiar state rule and correctly concluded that the agreement to lease created an equitable right in the United States which could be specifically enforced against a subsequent purchaser or encumbrancer who acquires an interest with notice of that equitable interest."

Washington has been a State for some fifty (50) years. It is a rather progressive State, and there is nothing peculiar about its laws. I certainly think this argument is very poor. The State law is a good law and is useable by everyone in the State of Washington. It would not hurt the post office department to conform to it and find that they can let out their bids and get their leases, the same as everyone else does in the State.

On Page 29 of Appellee's Brief, there is a footnote which says that he believes the State law might result in a lease under the situation herein set forth. This is incorrectly shown by the cases cited in the Appellant's Opening Brief, as there is nothing here to take the case out of the Statute of Frauds. Had the United States gone into possession and partially executed their lease by possession without knowledge that Appellant had a mortgage, the lease would have been

taken out of the Statute of Frauds and the Government would have an enforceable lease. This would constitute a part performance coupled with an interest. But the part performance required is, of course, occupation and some expenditure or other act which would put them in an irreparable situation.

All other questions are answered in Appellant's Opening Brief.

Respectfully submitted,

MARION GARLAND, JR.,

Attorney for Appellant.